

STATE OF MICHIGAN
COURT OF APPEALS

SHERRY A. NAVA-BURNS, Personal
Representative of the Estate of JERRY
BRANDEN LLOYD BURNS, Deceased,

UNPUBLISHED
November 25, 2003

Plaintiff-Appellant,

v

LOUIS DUNCAN and ROBERT DEBERADINO,

No. 242023
Wayne Circuit Court
LC No. 01-143096-NO

Defendants-Appellees.

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition and dismissing the case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's son died in a house fire that started as a result of overloaded electrical circuits. The house was not equipped with smoke detectors. Plaintiff alleged that defendants, the director and deputy director of the city's building and safety department, were negligent in failing to inspect the property and either have it condemned or brought up to code. The trial court ruled that defendants were immune from liability.

A motion premised on immunity granted by law is properly considered under MCR 2.116(C)(7). "This Court reviews all the affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construes the pleadings in favor of the nonmoving party. A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000). We review the trial court's ruling on a motion for summary disposition de novo on appeal. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

An employee of a governmental agency is immune from tort liability for an injury to a person caused by the employee while in the course of employment if: (1) the employee is acting or reasonably believes he or she is acting within the scope of his or her authority; (2) the governmental agency is engaged in the exercise or discharge of a governmental function; and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the

injury. MCL 691.1407(2). To be “the proximate cause” of the injury, the employee’s conduct must be “the one most immediate, efficient, and direct cause preceding an injury.” *Robinson v Detroit*, 462 Mich 439, 458-459; 613 NW2d 307 (2000).

For purposes of plaintiff’s gross negligence claim, the parties dispute only the third element. The one most immediate and direct cause of plaintiff’s decedent’s death was the fire. Plaintiff never disputes this, but instead contends that *Robinson* should not be applied retroactively. We disagree. The law is clear that the *Robinson* decision is to be given retroactive effect. *Ewing v Detroit*, 468 Mich 886; 661 NW2d 235 (2003); *Curtis v City of Flint*, 253 Mich App 555, 567; 655 NW2d 791 (2002). The trial court did not err in dismissing plaintiff’s gross negligence claim.

In a second count, plaintiff alleged that defendant Duncan was individually liable because he engaged in an ultra vires activity to which immunity did not extend. Specifically, plaintiff claimed that he was not licensed to serve as a building official or inspector as required by MCL 338.2312.

A governmental agency is only immune from tort liability if it is engaged in a governmental function, i.e., an activity expressly or impliedly authorized by law. MCL 691.1401(f); MCL 691.1407(1). Conversely, a governmental agency that is engaged in an ultra vires activity, i.e., one that is “*not* expressly or impliedly mandated or authorized by law[,]” is subject to liability. *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989) (emphasis in original). The exception for an ultra vires activity applies to the governmental agency and not to an employee of the agency. The test for employee liability depends on whether the employee is acting in the course of his employment and scope of his authority and whether his agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(2). Because plaintiff has not shown that Duncan was acting beyond the course of his employment and scope of his authority, she has failed to establish a right to relief.

Affirmed.

/s/ Jessica R. Cooper
/s/ Jane E. Markey
/s/ Patrick M. Meter